

The Gao Reference

Regarding *Gao*, by our count *Gao* uses the word “iris” thirty-three (33) times in the specification, not including in the figures.¹ However, never once does *Gao* suggest that the iris is invariant in human beings, as stated in claim 1 of the present application. And, of course, *Gao* therefore does not suggest utilizing this critical fact to calculate other facial dimensions. The non-final Official Action acknowledges this major shortcoming of *Gao* at the third paragraph on page 3 of the Action.

The Foley Reference

In order to make up for the shortcomings of the *Gao* reference, the non-final Official Action relies upon the abstract of *Foley*. However, the Applicant would like to respectfully point out that *Foley* was not published until December 27, 2001 which occurred after the filing date of the present application (June 15, 2001).

Foley does mention a U.S. priority date of May 31, 2000. However, according to 35 U.S.C. 102(e), a person shall be entitled to a patent unless:

“the invention was described in - (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effect under this subsection of a national application published under section 122(b) only if the international application designating the United States was published under Article 21(2)(a) of such treaty in the English language; or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that a patent shall not be deemed filed in the United States for the purposes of this subsection based on the filing of an international application filed under the treaty defined in section 351(a)” (emphasis added).

¹ *Gao* discusses an “iris” in WO 00/16683 at page 6 (line 12), page 7 (line 27), page 8 (line 11), page 11 (line 1), page 22 (line 9), page 23 (line 20), page 25 (lines 3 and 18), page 26 (lines 14, 18, and 22), page 27 (line 12), page 31 (line 25), page 49 (lines 5, 8, 9, 11, 12, 14, 21, and 26), page 50 (lines 2, 4, 6, 8, 9, 11, and 24), claim 7 (lines 1 and 22), claim 8 (lines 4, 6, and 17).

The applicant is not aware that the *Foley* U.S. priority application (09/584,061) was published before June 15, 2001. Further, the applicant is not aware that the *Foley* U.S. priority application has ever been granted.

Consequently, the Applicant respectfully believes that it is unnecessary to address the merits of the *Foley* reference at this time. However, applicant notes that *Foley* very clearly does not render present claims 8 and 17 obvious. According to *Foley's* page 50, lines 5-25, the *minor* radius is chosen to be the iris radius, whereas present claims 8 and 17 specifically state that the iris diameter is a *major* axis.

CONCLUSION

It is respectfully submitted that the pending claims 1-17 are allowable. Early passage of the pending claims to issuance is earnestly solicited.

Respectfully submitted,

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MARKED-UP VERSION SHOWING CHANGES MADE

Please amend the application as follows.

In the claims:

15. (Amended) The system of claim [15] 14, wherein the customer is located at a remote location from the merchant.

- 16. (Amended) The system of claim [15] 14, wherein the product that the customer wants to virtually try on is eyewear.
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17. (Amended) The system of claim [15] 14,
wherein the circular iris appears elliptical if viewed at a nonperpendicular angle by the imaging device, so that the iris has a longest diameter which is a major axis of an ellipse, and
wherein the longest diameter is the invariant diameter of the human iris.